HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 4875/04 (M.S.)
(Old No. 3742/1994)

Priya Lal and sons.

vs

R.C. Officer and D.S.O. Nainital.

Approved for reporting

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~~Not Approved for Reporting~~

Date of decision 30.09. 04.

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 4875(MS) of 2004
(Old No. 3742/1994)

Priya Lal and sons
residential of Commercial Building,
Set No. 2, Mallital, District Nainital. ...Petitioner

Versus

Rent Control and Eviction
Officer/D.S.O. Nainital. .....Respondents.

Dated : 30.09.2004

Hon'ble Mr. Rajesh Tandon. J.

Heard Sri Prakash Chandra Maulekhi learned Counsel for the Petitioner and Standing Counsel for the respondents.

By the impugned order, the petitioner has prayed for quashing of the order-dated 05.01.1994 by which the accommodation has been declared to be vacant.

Briefly stated, the premises in dispute is a commercial complex, of which the respondent no. 3 is the landlord. The ground floor and the portion of the first floor are under the tenancy of the petitioner and are used by the petitioner for business of photography. The firm of the petitioner is known as Priya Lal and Sons and the petitioner deals in photo goods.

Counsel for the petitioner has submitted that the business of the photography requires good weather and in the hills (Nainital), there is bad weather in the rainy season, and it is not possible to work in the rainy season, hence the petitioner has

opened a branch of his business at Agra. Taking advantage of the situation, one Sri Rajendra Prasad respondent No. 2, who himself runs the business under the name and style of Rajendra Work Shop at Indra Market Mallital, Nainitla, preferred an application on 11.01.1993 for allotment of only forst0floor of the building under the tenancy of the petitioner. When the owner of the Shop was away from Nainita, the Rent Control Inspector inspected the premises and in absence of the petitioner on 6th October 1993, the premises are inspected. On 20-8-1993, the Rent Control Inspector concerned has submitted his report, no statement was ever recorded and as such the compliance of Rule 8 of U.P. Act No. 13 of 1972 was not made.

On 05.01.1994, on the basis of the said report the Rent Control and Eviction Officer passed an order for declaring the vacancy in respect of the premises situated at first-floor of the Commercial Building at Mallital, Nainital as vacant.

Counsel for the petitioner has submitted that no notice was given to the petitioner as required under U.P. Act No. 13 of 1972. The averment to the effect, which has been taken from paragraph 11 of the Writ Petition regarding false report of the Rent Control Inspector, is quoted below:-

"That the owner of petitioner firm also lives along his family in the premises adjacent to the business premises in question. The Rent Control Inspector also did not try to call or contact any member of the owner's family at the time of alleged inspection of the 1st Floor and submitted a false report in without inspecting the disputed premises in collusion with interested parties. It is clear that he gave his report on the basis of enquiry from Sh. Bhupendra Singh who also runs a small business in the same first floor of the building. Sh. Bhupendra Singh himself was interested in allotment of the

said room (Hall) at first floor in regard to which alleged inspection was made as he himself made an application for the allotment of the premises. the other witnesses of the alleged inspection are also businessman and are also interested in allotment of the said premises. A photo copy of the Gas Connection care ration card, bill for the water charges from Kuman JalSansthan and receipt of house tax firm Municipal Board Nainital is annexed herewith as Annexure IIIA, IIIB, IIIC and IIID showing that the petitioner lives permanently in Nainital."

A counter affidavit has been filed, where it has been disputed that the rule 8 under the Act has not been complied with.

The supplementary Affidavit has been filed by the petitioner stating therein that in respect of the ground-floor, which is also in possession of the petitioner, the finding has been recorded by the Rent Control and Eviction Officer on 31.07.1995, where it has been mentioned that the Firm Priya Lal and Sons is also running. The relevant observations are quoted are quoted below:-

"उपरोक्त सभी तथ्यों से स्पष्ट है कि प्रश्नगत भाग विपक्षी द्वारा छोडा नही गया है उक्त भाग में फोटोग्राफी का व्यवसाय वर्तमान में भी चल रहा है। किरायेदार द्वारा किराया भी इसका दिया गया है जैसा कि पत्रावली में उपलब्ध भवन स्वामी द्वारा किरायेदार को दी गई रसीद की फोटो प्रतिलिपि से स्पष्ट है। यह रसीद दिनांक 15.7.1994 को जारी की गई है। यह सम्भव है कि पूर्व में रेन्ट कन्ट्रोल निरीक्षक द्वारा जब इस दुकान का निरीक्षण किया गया तब जोडे का मौसम होने के कारण दुकान कुछ समय तक बन्द रही है जैसा कि किरायेदार द्वारा अपने शपथ पत्र में कहा है परन्तु इस बात की पुष्टि नही हो पाई है कि प्रश्नगत भाग किरायेदार द्वारा खाली कर दिया गया है या प्रश्नगत दुकान में किरायेदार द्वारा कोई व्यवसाय नही किया जा रहा है अतः सम्पूर्ण

तथ्यों पर गौर करने के उपरान्त यह निष्कर्ष निकलता है कि उक्त प्रश्नगत भाग नियमानुसार रिक्त नही है। अतः रिक्तता आदेश दिनांक 3.9.1990 तथा रिक्त सुचना दिनांक 5.9.90 निरस्त किया जाता है । इस भाग के सम्बन्ध में प्राप्त सभी आवेदन पत्रों को भी निरस्त किया जाता है। पत्रावली दाखिल दफत होवे।"

The petitioner has also brought to the notice of the Court that on 15.03.2002, the partners of the petitioner firm has purchased the first-floor of the commercial building under the tenancy of the petitioner by registered sale deed dated 15.03.2002 and further proceeding under Section 12 of the Act has already been dropped in respect of the ground-floor. Relevant paragraph of the Supplementary Affidavit is quoted below:-

> *"4. That the premises in which the above firms is carrying on a business of photography is situate in Commercial Complex Mallital, Nainital. The respondent no. 3 Sri Sushil Kumar Chaudhary is the landlord of the said complex. The ground floor and a portion of the first are combindly by the petitioner for business of photography, but on 15th day of March, 2002 the partners of the petitioner's firm has purchase/the first floor of the Commercial Building under the tenancy of the petitioner firm from the said landlord i.e. respondent no. 3 vide Registered Sale Deed dated 15.03.2002."*

Counsel for the petitioner has submitted that the inspection was done without giving the notice to the petitioner and further there is no bar in occupying the two shops one at Agra and one at Nainital.

A perusal of the record shows that vacancy has been declared without complying the provisions of Rule 8 of U.P. Act No. 13 of 1972 and further without recording any findings with

regard to the applicability of Section 12(1) (a) of the Act. Section 12 (1) (a) reads as under:-

"12. ***Deemed vacancy of building in certain cases.***–*(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if–*

(a) he has substantially removed his effects therefrom,"

Rule 8 reads as under:-

"Ascertainment of Vacancy [Section 12, 16 and 34 (8)]

(1) The District Magistrate, shall, before making any order of allotment or release in respect of any building which is alleged to be vacant under Section 12 or to be otherwise vacant or to be likely to fall vacant, get the same inpected.

(2) The inspection of the building, so far possible, shall be made in the presence of the landlord and the tenant or any other occupant. The facts mentioned in the report should wherever practicable, be elicited from at least two respectable persons in the locality and the conclusion of the inspection report shall be pasted on the notice board of the office of the District Magistrate for the information of the general public, and an order of allotment may be passed not before the expiration of three days from the date of such posting, and if in the mean tiem any objection is received, not before the disposal of such objection.

(3) Any objection under sub-rule (2) shall be decided after consideration of any evidence that the objector or any other persons concerned may adduce."

In Maharaja Kumari Vimal Devi Vs. Rent Control and Eviction Officer, Mussorie and another ARC 1983 (2) 225, the observation are quoted below:-

"We find merit in both these contentions raised by the learned counsel. The instant case appears to be one of those classes of cases where the landlord bonafide retains for his own occupation the building at more than one place. It is a matter of common knowledge that for genuine reasons and bona fide purposes it some times necessitates a landlord bona fide and for genuine purpose to retain the accommodations at more than one place for his own use and occupation. Many accommodations situate at hill stations are not occupied all round the year. They are occupied only during summar months when people like to spend their days away from the scorching heat in the plains. Similar appears to be present case. The petitioner thought she lives with her family members in Delhi, retains the premises, namely, "Oak" and ' Oak Bush' for her use and occupation during visit made by her and her family members to Mussorie."

"Since we have already held that there was no deemed vacancy of any part of the premises in question, no part of the premises was open to allotment and any proceedings under taken for allotment of any part of the premises are hence without jurisdiction and without any authority of law. On this view, the order dt. October 27,1978 deposing of the application of the petitioner to her claim under sub-rule (9) of Rule 10, also falls."

Relying upon the decision in Full Bench, it has been held in the case of B.N. Kohli Vs. The District Magistrate, Nainital (R.c. & E. Officer, Nainital and others) A.R.C. 1982(1) Page 388 Paragraphs 4 and 5:-

"As far as the argument of the learned counsel for the respondents that the petitioner had an alternative remedy of filing a revision, in my opinion in the facts and the circumstances of the case, the petition is not liable to be thrown on that ground. In the present writ petition the petitioner has challenged the jurisdiction of the Prescribed Authority in applying the provisions of Section (12) (1) (c) of the U.P. Act No. XIII of 1972 on the ground that they are only prospective and cannot be applied retrospectively. Alternative remedy is not a complete bar for exercise of extraordinary jurisdiction under Article 226 of the Constitution.

Relevant Part of Section 12(1) (c) provides as follows:-

"12. Deemed vacancy of building in certain cases–(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof–

(c) in the case of residential building, he as well members of his family have taken up residence, not being temporary resident elsewhere."

5. It has been held in the case of Kimti Lal Grover (supra) after relying cases on a full Bench and a Division Bench of this Court that the provisions contained in Section 12(1) (c) namely that even though there in no actual vacancy, the residential premises would be deemed to be vacant if a tenant as well as members of his family take up residence no being temporary residence else where would apply only if the tenant takes up such residence along with the members of his family, after coming into force of U.P. No. 13 of 1972, and that is does not apply to a case where the tenant continues to occupy an accommodation despite the fact that he takes up residence of permanent nature along with his family members elsewhere, before coming into force of U.P. Act No. 13 of 1972."

Relying upon the aforesaid decision, it has been held in the case of Raghunath Prasad Vs. Ist Additional District Judge, Nainital and others, 1982 (2) ARC P. 125, Paragraph 19:-

"Learned counsel for the landlord invited my attention to the decision of this Court in H.N. Kaushal v. Ist Addl. District Judge, Kanpur and others in support of his contention that Smt. Dropdi Devi must be deemed to have been permanently residing at Bareilly. This case lays down the tests which have to be applied in determining whether a building is liable to be deemed vacant under Section 12 (1) (c) when the tenant takes up residence elsewhere and also retains his old place of abode. In my opinion, it is premature to comment on this decision. In my view facts necessary for determining the issue relating to the applicability of Section 12 (1) (c) have not been properly investigated by the court below and as the case is being remanded to the court below for a reconsideration of the issue, I am expressing no opinion whether this decision has any application to the facts of the present case. The same thing is also true of the decision cited by the learned counsel for the petitioner in B.N. Kohli Vs. D.M. Nainital and others."

In view of the fact that neither Rule 8 has been complied with nor the substantial removal as required by section 12 has been proved, the order therefore, passed by the Rent Control and Eviction Officer cannot be allowed to stand.

Premises was already found locked and therefore, the deeming clause cannot be applied without following the procedure prescribed under the Act and the rules.

Further in view of the development that the petitioner has acquired the ownership rights the application under Section 12/16 itself requires reconsideration.

In view of the aforesaid, the Writ Petition is allowed. The matter is sent to the Rent Control and Eviction Officer for passing suitable order in the light of the observations made above.

Subject to the aforesaid observation, writ petition is allowed. No order as to costs.

Dated:-30-09-2004 (RAJESH TANDON J.)

Rathor